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No. 81-2323

In the Supreme Court of the United States

OCTOBER TERM, 1982

W. H. MOSELEY COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a contractor's failure to certify its claim in accordance with Section 6(c)(1) of the Contract Disputes Act of 1978, 41 U.S.C. (Supp. IV) 605(c)(1), is a jurisdictional bar to de novo adjudication by the Court of Claims of a contracting officer's denial of the claim.

2. Whether petitioner's submissions to the contracting officer in support of its claims constituted "certification" within the meaning of Section 6(c)(1) of the Act.

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OPINIONS BELOW

The order of the Court of Claims (Pet. App. A-1 to A-4) is not reported. The opinion of the Court of Claims (Pet. App. B-1 to B-4) is reported at 677 F.2d 850.

JURISDICTION

The order of the Court of Claims was entered on March 23, 1982. The opinion of the Court of Claims was issued on April 21, 1982. The petition for a writ of certiorari was filed on June 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. On January 31, 1978, petitioner received a procurement contract from the Defense Logistics Agency for french fried potatoes (Pet. App. K-2). The contract included a "Value Engineering Incentive Proposal," which provided that if petitioner submitted any cost-reducing modifications in the standards of the contract that were accepted by the Agency, the savings would be passed on to petitioner (*id.* at K-5). In accordance with this provision, petitioner proposed to modify the color specifications for the french fries and that modification was approved (*id.* at K-2 to K-3).

On June 15, 1979, petitioner wrote to the contracting officer of the Defense Logistics Agency, claiming vaguely that its proposal to change the color specifications had saved the Agency in excess of $2 million (Pet. App. K-4).[1] Petitioner did not contend that its proposal had reduced the cost of performing its contract. In fact, it conceded that the manufacturing costs were unaffected by the proposal (*id.* at K-5). Instead, petitioner claimed that for future contracts more providers would be able to bid on french fries with the lowered standards and the increased competition would lead to reduced costs to the government.

On February 6, 1980, the contracting officer denied petitioner's claim on the basis that the savings envisioned by the "Value Engineering Incentive Proposal" clause were for costs associated with the performance of the contract itself and not for the kind of future savings claimed by petitioner (Pet. App. K-14 to K-16). The officer also notified petitioner that

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[1] In support of its claim, petitioner supplied an economist's analysis of the effect of the proposal (Pet. App. C-1 to C-2).

it could appeal either to the Armed Services Board of Contract Appeals or the Court of Claims (*id* at K-17).

2. Petitioner filed suit in the Court of Claims, seeking to recover the value to the government of the proposed modification in the color of french fries required under the original contract. The United States moved to dismiss for petitioner's failure to "certify" its claim with the contracting officer, as required by Section 6(c)(1) of the Contract Disputes Act of 1978, 41 U.S.C. (Supp. IV) 605(c)(1).[2] Petitioner then resubmitted its claim to the contracting officer and certified in accordance with Section 6(c)(1) that the claim was made in good faith, that the supporting data were complete and accurate and that the claim (for approximately $1.16 million) accurately reflected the government's liability to petitioner under the contract.

On February 3, 1981, petitioner filed a second petition in the Court of Claims, again seeking review of the February 6, 1980, denial of its claim by the contracting officer. The first petition was then dismissed voluntarily and the United States moved for summary judgment with respect to the remaining action.

The Court of Claims granted the motion by order of March 23, 1982 (Pet. App. A-1 to A-4). The court held that it lacked jurisdiction because petitioner failed to certify its claim properly to the contracting officer as required by Section 6(c)(1) of the Contract Disputes Act of 1978, as interpreted by the court in

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[2] 41 U.S.C. (Supp. IV) 605(c)(1) provides in pertinent part:

> * * * For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

its prior decision in *Paul E. Lehman, Inc.* v. *United States*, 673 F.2d 352 (1982), and that the action of the contracting officer in deciding the claim on the merits could not constitute a waiver of the jurisdictional defect (Pet. App. A-3 to A-4).

The Court of Claims amplified its order in a subsequent opinion (Pet. App. B-1 to B-4). The court rejected petitioner's argument that the materials it had supplied to the contracting officer, taken as a whole, were sufficient to constitute certification. The court concluded that the documents did not satisfy any of the specific requirements of Section 6(c)(1) and that petitioner's subsequent certification to the contracting officer was inadequate to cure the jurisdictionally defective prior submission (Pet. App. B-3).

Subsequent to the Court of Claims' dismissal of the second petition, petitioner wrote the contracting officer requesting a final decision on its claim under the Contract Disputes Act of 1978 (Pet. App. M-1 to M-4). The contracting officer responded that she already had issued "[a] valid final decision in this matter" on February 6, 1980 (Pet. App. O-1).

ARGUMENT

1. Petitioner contends (Pet. 7-12) that the Court of Claims erred in holding that the certification requirement in Section 6(c)(1) of the Act is a jurisdictional bar to direct judicial review of the contracting officer's decision. This claim does not warrant this Court's scrutiny. The decision below, rendered by the court with primary authority for interpreting the Contract Disputes Act of 1978, is a reasonable interpretation of the statute and does not conflict with the decision of any other court.

Prior to the Contract Disputes Act of 1978, a contractor wishing to challenge a contracting officer's de-

cision was required to appeal the decision to the agency's board of contract appeals, where a trial de novo was held. A contractor dissatisfied with the board's decision could seek review in the Court of Claims under the Wunderlich Act, 41 U.S.C. 321 and 322. The court's review in such circumstances was limited to the record before the board, and the decision of the board was "final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." *Ibid.*

The Contract Disputes Act of 1978 altered this system by affording contractors challenging a contracting officer's decision the option of either following the old procedures or of bypassing the contract appeals board and filing suit directly in the Court of Claims. 41 U.S.C. (Supp. IV) 606 and 609(a)(1). In the latter event, the court conducts a trial de novo. 41 U.S.C. (Supp. IV) 609(a)(3). In order to invoke the Act's authorization of direct review in the Court of Claims, however, a contractor must adhere strictly to the statutory procedures, including the certification requirement.

The Court of Claims in *Paul E. Lehman, Inc.* v. *United States*, *supra*, 673 F.2d at 355, examined the legislative history of the Contract Disputes Act of 1978 at length and concluded that it was Congress' intention that "[u]nless [the certification] requirement is met, there is simply no claim that this court may review under the Act." To support its conclusion the court pointed out (*ibid.*; emphasis added) that Admiral Rickover had proposed to Congress to "'[r]equire as a matter of law that prior to evaluation of any claim, the contractor *must submit* to the Government a certificate * * *.'" See *Contract Disputes Act of 1978: Joint Hearings on S. 2292, S. 2787 and*

S. 3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 21 (1978). Congress, in adopting Section 6(c)(1), used language almost identical to that proposed by Admiral Rickover, causing the Court of Claims to infer that Congress intended the requirement to be as strict as the Admiral had indicated and therefore to be jurisdictional in nature. See 28 U.S.C. 2675 (administrative claim requirement of Federal Tort Claims Act).

This interpretation of the statute is reasonable and does not impose an unfair burden on the contractor. It merely requires that the claim include three simple representations in order to be reviewable directly by the Court of Claims. This requirement assures that every claim has some basis in verifiable fact and encourages settlement of claims. See *Hearings, supra*, at 26-35; S. Rep. No. 95-1118, 95th Cong., 2d Sess. 7 (1978).[3] Since the decision of the Court of Claims is faithful to Congress' intent in passing Section 6(c)(1), it does not warrant review by this Court.

2. Petitioner argues (Pet. 12-15) alternatively and under several theories that even if the Court of Claims is correct that the certification requirement is juris-

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[3] Petitioner's assertion that it no longer has an option to proceed de novo before the relevant board of contract appeals (Pet. 15) is incorrect. The limitations periods before such boards are subject to waiver, and it is within a board's discretion to excuse a contractor's delay. *Maney Aircraft Parts, Inc. v. United States*, 453 F.2d 1260 (Ct. Cl. 1972); *Schlesinger v. United States*, 383 F.2d 1004 (Ct. Cl. 1967). The administrative forum thus may still be open to petitioner (Pet. App. B-3).

dictional, the court erred in holding that petitioner's "certification" was inadequate. First, petitioner asserts (Pet. 11-12) that the adequacy of its claim under Section 6(c)(1) should be a question for the contracting officer's discretion and, if she was sufficiently satisfied with the claim to decide it, then the Court of Claims should accept jurisdiction over the claim.[4]

Petitioner's argument is without legal or factual support. First, it assumes that the contracting officer has discretion to disregard the statutory preconditions to the United States' waiver of sovereign immunity. Obviously, the officer has no such power. See *Paul E. Lehman, Inc.* v *United States*, *supra*, 673 F.2d at 356; *M-R-S Manufacturing Co.* v. *United States*, 492 F.2d 835 (Ct. Cl. 1974) (certification provisions of the Truth in Negotiations Act, 10 U.S.C. (Supp. IV) 2306(f), are not subject to waiver by a government agent). Second, it assumes that the contracting officer found that petitioner's claim was properly certified upon submission, but the officer never made such a finding, nor on this record could she.

Petitioner's next theory (Pet. 12-13) is that the Court of Claims erred in not finding that its extensive submissions to the contracting officer satisfied Section 6(c)(1). Petitioner's attempt to manufacture

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[4] Petitioner contends (Pet. 9) that the Contract Disputes Act of 1978 vested "new power" in the contracting officer to settle disputes, a power that according to petitioner inherently includes discretion to deem a claim to be certified. A contracting officer has always had authority to compromise breach of contract claims. See *Cannon Construction Co.* v. *United States*, 319 F.2d 173 (Ct. Cl. 1963). The "new power" vested by the Act was granted to boards of contract appeals to adjudicate breach of contract claims. 41 U.S.C. (Supp. IV) 607(d).

a certification out of its various statements is without merit; petitioner clearly did not meet any of the explicit requirements of Section 6(c)(1), and the Court of Claims properly so found (Pet. App. B-3).

Petitioner also contends (Pet. 14-15) that any jurisdictional deficiency in its claim was cured by its submission of its purported certification to the contracting officer on December 31, 1980, ten months after the issuance of her decision. In order to protect the government from baseless claims, Section 6(c)(1) requires the contractor to present the contracting officer with a certified claim at the outset of the process, if he wishes ultimately to obtain direct review in the Court of Claims, as newly provided in the Contract Disputes Act of 1978. Having failed to provide certification, petitioner in effect presented no "claim" for purposes of the Act. The Court of Claims thus properly held that petitioner's belated submission was insufficient to cure its earlier failure to satisfy the mandate of Section 6(c)(1).

Finally, petitioner argues (Pet. 13-14) that the government should be estopped to challenge the adequacy of certification because of its alleged failure to advise petitioner correctly of the procedures required under the Act. This argument is frivolous. Assuming estoppel is ever appropriate when dealing with statutory conditions on the government's waiver of sovereign immunity, this certainly is not an appropriate case for applying the doctrine. The certification provisions of the Act are quite clear. Petitioner had no reason to expect the contracting agency to explain the requirements of the statute to it. See *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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